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NO. 88-1204

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1988

ALFRED AVINS & NORTHERN VIRGINIA LAW SCHOOL, INC.,
Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, ET AL.,
Respondents,

and

STANLEY E. HARRISON, ET AL..,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Virginia

BRIEF OF THE COALITION FOR RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition for Religious Freedom petitions the Court seeking leave to file a brief *amicus curiae* in support of the petition for writ of certiorari filed by Avins, *et. al.*, in their dispute with the Virginia Council of Higher Education, now pending before this honorable Court.

The state parties, through their legal representative, the office of the attorney general of Virginia, has refused to consent to the Coalition's request to file a brief *amicus curiae* in this matter. Unfortunately, the state views the matter as a simple one of merely local interest.

For proponent amicus, however, the case presents issues of far reaching consequence both on the substantive issues of free speech and on statutory concerns related to the effectiveness of Section 1983.

Without fully setting out the arguments for granting the writ, proponent amicus asserts the issues at the heart of this litigation to be content-based regulation of speech and the proper scope of Section 1983 remedies: matters that were treated superficially below and deserve this Court's attention.

Because the parties have failed to provide an analysis which will sharpen the Court's focus on these issues, the Coalition hopes to aid the Court in this matter.

INTEREST OF AMICUS

Proponent Amicus Coalition for Religious Freedom is a non-profit, tax-exempt corporation first organized in the District of Columbia on June 12, 1984 under the name Committee for Religious Freedom. The Coalition is engaged in efforts to inform the public about the importance of religious freedom and to highlight instances of intrusion upon religious liberties. Its informational programs include publications, documentary films, educational conferences and a monthly newspaper, "The Religious Freedom Alert." The Coalition is supported by contributions from the public, from businesses and other non-profit organizations

In addition to its general informational activities, the Coalition assists in the education of local communities and government officials on constitutional guarantees of religious liberty in situations where a specific breach of First Amendment liberties has been alleged. In numerous cases, the Coalition has assisted parties engaged in disputes over licensing of church ministries by providing an objective constitutional framework for understanding and analyzing the legitimate interests of the church and the state.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted because it presents major public questions related to free speech: identifying the Constitutional limitations of coercive state power to regulate speech on the basis of content. Further, the case requires a determination of the proper remedial scope of

Section 1983, and requires that this Court vindicate *Erie* principles by insuring that substantive law equality between parties who bring 1983 actions in state and federal courts be maintained.

This matter is appropriate for review under the writ because the state court decided a federal question in a way that conflicts with both the holding of other state courts and the federal court of appeals. *See* Rule 17(b). Further, the holding below presents important questions of federal law which either have been settled or should be settled by this Court. Rule 17(c).

The trial court erred in dismissing the Section 1983 action as improperly based on a theory of *respondeat superior*, where personal involvement of the state officer was alleged. The decision is counter to the relevant holding of the U.S. Court of Appeals for the Fourth Circuit.

The trial court erred in determining that only the individual council members, and not the corporate body, were proper defendants in a Section 1983 action. Where the plaintiff sought only injunctive relief, the holdings of this Court find no Eleventh Amendment ban.

The refusal to permit the plaintiff below to amend his complaint to reach the state officers in their individual capacity violated established federal procedure for Section 1983. Because this is outcome determinative it violates *Erie* principles by failing to assure the litigant in state court the same substantive federal rights as one in federal court.

The trial court erred in failing to consider charges of content-based regulation of speech in dismissing First Amendment claims related to license renewal.

Consistent with Rule 17, the court should issue the writ and review these important questions.

STATEMENT OF THE CASE

In April 1982, the Northern Virginia Law School was granted approval by the Virginia Council of Higher Education (Council) to confer the degree of Juris Doctor, and was obligated to seek accreditation from the American Bar Association or other approved accrediting body. *Avins, et al v. Virginia Council of Higher Education, et al*, Chancery No. 18065 (Ltr. decision, dated 2/26/1988, p. 4). The school was

authorized to enroll students in 1980, and a 1982 inspection visit by the Council's staff resulted in a favorable report.

In 1986, the school attempted to organize a summer program in "conservative law" but was unable to secure enrollment due to insufficient interest. Students from other schools could not transfer credit from Northern Virginia Law School because it was not accredited by the American Bar Association. In the following year, in an effort to overcome the enrollment problem, the school petitioned the Council to permit students from accredited law schools in the state to attend the summer program in violation of the A.B.A. rule only permitting credit for work completed at other A.B.A. accredited institutions.

In response the state not only prohibited the school from teaching the conservative law class to students of other law schools but to its own students as well. The state Attorney General's office, writing in behalf of the Council, threatened criminal prosecution if the class were taught in summer. The Board of Directors voted not to offer the class.

Charging both state statutory and federal constitutional law violations, the school sought relief in a state court action. The school's multi-count complaint was dismissed in separate letter opinions by the Circuit Court of Alexandria, Virginia dated February 26, 1988 and July 14, 1988 by Judge Alfred D. Swersky.

In addition to state law claims, the plaintiff had alleged that first the denial of permission to teach the class, and later revocation of the school's certificate were motivated by improper political considerations and constituted impermissible content-based regulation of speech.

An appeal to the Virginia Supreme Court proved fruitless, and action was taken to gain review by this honorable court.

ARGUMENTS FOR GRANTING THE WRIT

The episode under review in this lawsuit, a charge that a state agency acted out of political bias in suppressing speech, is a most serious one. The prospect becomes even more frightful when it is alleged that criminal prosecution was threatened against acts of pure speech and advocacy which presented no threat of immediate harm to anyone.

A review of the record of the court below reveals a failure to appreciate the seriousness of this charge of content-based discrimination, and to extract an appropriate explanation for it.

The court below committed serious error when it dismissed the Section 1983 action because it improperly mischaracterized the degree of personal involvement needed to hold a public official liable; improperly held that only the Council members, and not the Council, were proper party defendants; failed to permit the plaintiff to amend to include the individual defendants, and ignored a charge of content-based regulation of speech.

The charges of political discrimination by a state regulatory board are deeply disturbing and require the most careful judicial review. Yet, here the trial and later the reviewing appeals court appear to have short-circuited the process, and to have either ignored serious charges of misconduct, or to have applied improper legal standards in reviewing those charges.

This case presents serious public policy questions with broad implications. In addition to the content-based speech charges, this case invites the court to consider the sensitive relationship between a state board designated to insure the quality of educational programs—and in this episode one charged with the rigorous responsibility of providing professional education; and the academic freedom and speech rights of an institution and its instructors. Because this case involves complex issues of individual liberty and comprehensive regulation in the public interest, the court should review this case in order to insure that a proper balance has been struck.

The questions presented by the petitioner raised serious questions about the review process below. It is possible that the administrative process and its subsequent judicial review failed to accord sufficient weight to the speech or academic freedom rights of the parties.

Professional schools are not blank transfers of technique. Rather, they can and should challenge the presumptions and conventions of their chosen calling. Only in this way can the vigorous debate ensue which is the hallmark of a free society. But, if the process we use to ensure quality generates a timid rigid conformity, that minimal technical quality may be an empty shell, purchased at the price of a free marketplace of ideas.

The conflict between N.V.L.S. and the Council is neither unique nor isolated; rather, it may be proto-typical of a growing split between established forces and those who out of conscience seek to build new institutions to challenge or spur established professional institutions. Should those with a special calling be effectively silenced in this critical theater, and at what costs? Under the flag of professional standards, experts attempt to convey their moral preferences as value-free expertise. Sadly, they may attempt to silence dissent not in the name of conformity, for our system knows no doctrine or official creed, but in the public interest.

In this case the further charge is alleged that partisan bias colored the proceedings, taking these charges as true as must be the case on motions to dismiss, a court should have more vigorously reviewed this matter.

I. THE TRIAL COURT ERRED IN DISMISSING THE SECTION 1983 ACTION AS IMPROPERLY BASED ON A THEORY OF *RESPONDEAT SUPERIOR*, WHERE PERSONAL INVOLVEMENT OF THE STATE OFFICER WAS ALLEGED.

Count I of Avins' complaint charged Virginia Attorney General Terry with violation of the school's rights by acting through an assistant attorney general to enforce the mandates of the Council; and further she is accused of threatening the plaintiffs with criminal prosecution for their speech activities related to the conservative law class.

The court dismissed the claims, holding that they were insufficient as a matter of law to impose personal liability because they involved no charge of personal conduct, only charges of *respondeat superior*. The court cited *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977).

The court's reliance upon this case is misplaced, as the trial court's interpretation of *respondeat superior* was misdirected. In *Vinnedge*, a prisoner claiming violation of his constitutional rights because he was denied medical care sued a host of state officials. Among the group was Gibbs who had administrative responsibility for setting standards for jails. However, the immediate responsibility for the prisoners' medical care was by statute fixed in another officer. 550 F.2d 926, 928 (4th Cir. 1977).

Here the court rejected the claim, noting that "the doctrine of *respondeat superior* has no application under this section." *Id.* But this applies only where the plaintiff fails "to allege any personal connection between" the officer "and denial of constitutional rights." 550 F.2d at 928.

Here the plaintiff asserts the requisite personal connection. The Attorney General in both official and personal capacity is charged with involvement. Here it is not charged that the agent acted independently or without the knowledge of the principal. Rather, it is charged the agent acted at the instruction of the principal who acted out of bad political motive.

While the petition was terse it was sufficient to escape summary dismissal because it charged personal "connection." The court erred in presuming that the acts of a subordinate could not be charged to a principal once it was asserted the principal acted out of a bad motive in authorizing administrative action by the subordinates.

II. THE TRIAL COURT ERRED IN DETERMINING THAT ONLY THE INDIVIDUAL COUNCIL MEMBERS AND NOT THE COUNCIL WERE PROPER DEFENDANTS IN A SECTION 1983 ACTION.

The court below erred when it held that, "The Council is not a person within the meaning of Section 1983...." Letter decision, February 26, 1988, p. 2. The court cites no authority to support the contention that a corporate body may not be a proper Section 1983 defendant.

A state or its agencies may be "persons" within the meaning of Section 1983, and without violation of sovereignty immunity where an action proceeds in state court and only perspective relief is sought. *See, Gumbhir v. Kansas State Board of Pharmacy,* 231 Kan. at 513, 646 P.2d at 1084. *See also, Ramah Navajo School Board v. Bureau of Revenue,* 720 P.2d 1243, 1249 (N.M. App. 1986); *Woodbridge v. Worcester State Hospital,* 384 Mass. 38, 44, 423 N.E.2d 782, 786 n. 7 (1981).

Where, as here, the relief sought is injunctive, a state agency is broadly held to be a proper person within the meaning of Section 1983. *See, Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1984); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (permitting injunctive relief).

But here again the court's failure to spell out its logic places the summary nature of its holding in doubt. At least it should be remanded for a more specific statement.

An additional consideration the Court should weigh is that, so far as is practical, the choice of forum should be a neutral factor in the vindication of federal rights. If it emerges that the outcome under Virginia policy relating to sovereign immunity produces a different, and less liberal, result than the application of Eleventh Amendment immunity in a federal court in Virginia, then an unreasonable forum-based disparity exists which should be reviewed. For this reason this Court has held hwere state proceedures unduly restrict a litigant's opportunity to assert a federal right, the state must use federal proceedures. *Dice v. Akron, Canton & Youngstown RR.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed.2d 398 (1952).

III. THE TRIAL COURT ERRED IN FAILING TO PERMIT THE PLAINTIFF TO AMEND HIS PETITION TO INCLUDE COUNCIL MEMBERS IN THEIR INDIVIDUAL CAPACITIES.

Even assuming that the Council was not a person within the meaning of Section 1983, it was error for the trial court to deny the plaintiff to include these indispensable parties.

Whatever the state practice may be where a federal claim is involved local procedural rules should not be permitted to become outcome-determinative in contravention of liberal substantive federal policy.

In federal practice it would be error to dismiss a Section 1983 claim, where it could be salvaged by amendment to include parties. Before a petition can be dismissed it must be clear that a plaintiff cannot plea grounds to maintain the action. See: *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986).

Only two allegations are necessary to support a Section 1983 claim: a charge that a federal right was deprived, and the charge that it was by state action. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L. Ed.2d 572 (1980).

Here the charge that free speech rights were denied on a content basis by a state agency in violation of the First Amendment met the requirement for a proper pleading of a

1983 charge. Given this predicate the court should have permitted the party to amend.

IV. THE TRIAL COURT ERRED IN FAILING TO CONSIDER CHARGES OF CONTENT-BASED REGULATION OF SPEECH IN DISMISSING FIRST AMENDMENT CLAIMS RELATED TO LICENSE RENEWAL.

The trial court erred in dismissing Avins' claims without first evaluating the significance of alleged content-based discrimination in violation of the First Amendment. The court presumes that First Amendment rights were not violated because despite the state action the school remained free to offer the course on a non-credit basis. So generous a rule can only apply where the state action is neutral.

The trial court erred in placing its reliance on *Shelton College v. State Board of Education*, 226 A.2d 612 (New Jersey, 1967). *Shelton* stood for the general proposition that the state could regulate the award of college degrees; however, the holding recognized the danger of content-based regulation. It supported the state agency action only when "there is no proof whatever that the state board is bearing down upon Shelton [the school] because of Shelton's convictions upon a topic." 226 A.2d at 620.

In the instant case just such an improper content-based discrimination is charged. It is well established that a right otherwise clearly within the state's power may be lost where the state acts from bad motive. Here even assuming that the state has control over individual course content, it is wrong to exercise that power to punish unpopular beliefs. Where such an allegation is of record the court must address it . However, the court below appears to have ignored these serious problems because of confusion over the requirements of a Section 1983 action.

CONCLUSION

While regulation of schools and colleges may be a public necessity, its abuse on content-based speech grounds is a serious threat to a free society and the marketplace of ideas. A charge of intimidation of speech by threat of criminal prosecution should be given the careful review. Speech is all

too quickly chilled. The court below failed to properly protect the First Amendment interest.

As set forth above, the petition for certiorari should be granted because it presents major public questions related to free speech: identifying the Constitutional limitations of coercive state power to regulate speech on the basis of conduct. Further, the case requires a determination of the proper remedial scope of Section 1983, and requires that this Court vindicate *Erie* principles by insuring that substantive law equality between parties who bring 1983 actions in state and federal courts be maintained.

This matter is appropriate for review under the writ because the state court decided a federal question in a way that conflicts with both the holding of other state courts and the federal court of appeals. *See* Rule 17(b). Further, the holding below presents important questions of federal law which either have been settled or should be settled by this Court. Rule 17(c).

The court below committed repeated errors of law and policy related to Section 1983 action. The case could be of far-reaching consequences. It gives the court an opportunity to address these issues and aid other courts in avoiding error. Consistent with Rule 17, the court should issue the writ and review these important questions.

Respecfully submitted,

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